Supreme Court, U.S.
FILED

No. 98 1862 FEB 8 1999

OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1999

LOMBARD CORPORATION.,

Petitioner,

v.

MARCUS E. COLLINS, in his official capacity as Commissioner of the State of Georgia, and TOM SCOTT, in his official capacity as Tax Commissioner of DeKalb County, Georgia,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

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PETITION FOR WRIT OF CERTIORARI

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February 4, 1999

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9DP?

QUESTIONS PRESENTED FOR REVIEW

1. May a non-party interfere with, obstruct, impede, deter and otherwise deny to a party to any litigation the right to seek and obtain a final determination of the issues presented in the litigation by committing an act and/or acts, calculating to interfere with, obstruct, impede, deter and otherwise deny to a party litigant that litigant's right to the Courts, which includes the resolution of the issues presented in the litigation, all of such acts by the non-party being without the consent and without any authorization by the party litigant against whom the interfering act was committed?

2. Where the United States Supreme Court has determined that a certain State property intangible tax was unconstitutional, may another State and/or its political subdivisions seek to evade, ignore, and otherwise moot the application of the United States Supreme Court decision by, amongst other things, refusing to render a State court ruling as to the unconstitutionality of such State's intangible personal property tax by either acting in concert with some unknown non-party to perform an illegal act calculated to moot the issue presented to the State court and/or to take advantage of the illegal act for the purpose of protecting private interests, who would be adversely affected by compliance with the United States Supreme Court decision, and/or seeking to retain the ill-gotten gains produced by the collection of the unconstitutional and illegal property and intangible tax?

3. May a State individually, or in collusion with others, take such actions and do such things as obstruct justice?

CERTIFICATE OF INTERESTED PERSONS

The names of all of the parties are contained in the caption of the case.

There is no parent or subsidiary company to be listed as to Petitioner, The Lombard Corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

CERTIFICATE OF INTERESTED PERSONS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

ANALYSIS 20

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Fulton Corporation v. Faulkner, Case No. 94-1239; 116 S.Ct. 848 (1996). 2, 7, 8

Georgia Constitution

Constitution of the State of Georgia, Article 1, Section 1, Paragraph 12.....19

Georgia Statutes

O.C.G.A. § 40-6-38 6
O.C.G.A. § 48-3-21..... 6
O.C.G.A. § 48-6-20 7
O.C.G.A. § 48-6-20, et seq..... 7
O.C.G.A. § 48-6-21..... 3
O.C.G.A. § 48-6-22 ..... 3, 7
O.C.G.A. § 48-6-27 6
O.C.G.A. § 48-6-30..... 4
O.C.G.A. § 48-6-32..... 5
O.C.G.A. § 48-6-40.....4
O.C.G.A. § 48-6-44..... 5

Federal Statutes

28 U.S.C. § 1257.....2

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Lombard Corporation respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Georgia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is set out in the Appendix, *infra*. (Appendix J). That opinion reversed the decision of the Court of Appeals of the State of Georgia, rendered on November 19, 1997, which is set out in the Appendix, *infra*. (Appendix I).

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. § 1257 under which jurisdiction Petitioner seeks review by the Supreme Court of the United States of the actions of the State of Georgia, its political subdivision, and others to evade and circumvent the decision of this Court in the case of Fulton Corporation v. Faulkner, now 116 S.Ct. 848 (1996), contrary to the United States Constitution and the Constitution of the State of Georgia.

STATEMENT OF THE CASE

On August 2, 1995, Petitioner The Lombard Corporation (hereinafter "Lombard") filed its Complaint (Appendix A) by and through its counsel Robert J. Proctor, a member of the State Bar of Georgia against Respondent Marcus E. Collins, Sr., in his official capacity as Commissioner of the Georgia Department of Revenue (hereinafter "State Revenue Commissioner") and Respondent Tom Scott, in his official capacity as Tax Commissioner of

DeKalb County (hereinafter "DeKalb Tax Commissioner") seeking to declare unconstitutional the imposition of a tax upon intangible personal property.

O.C.G.A. § 48-6-21 provided for the imposition of the tax:

> "Intangible personal property, for the purpose of ad valorem taxation, is classified as follows:
>
> ...(3) Stocks;
>
> ...(5) Bonds and debentures of all corporations; ...seeking to declare unconstitutional the imposition of a tax upon intangible personal property."

O.C.G.A. § 48-6-22 provided for various exemptions from the intangible personal property tax:

> "(5) Common voting stock of a subsidiary corporation not doing business in this state [Georgia] if at least 90% of the common voting stock is owned by a domestic corporation with its principal place of business in [Georgia] and was acquired to be held for the purpose of enabling the parent company to carry on some part of its established line of business through the subsidiary;
>
> (6) Stock of a corporation organized under the laws of [Georgia] if the corporation pays all taxes in [Georgia] as provided by law. For purposes of this paragraph, the term "corporation" also means any depository financial institution;

> (7) Stock of a domesticated foreign corporation if the corporation pays to [Georgia] or its political subdivisions all taxes as provided by law." [Bracketed substitutions ours].

O.C.G.A. § 48-6-40 provided for the distribution of the taxes so collected:

> "Revenue derived from taxes on intangible personal property shall be divided among the state and all other tax jurisdictions and districts including, but not limited to, county and municipal districts, which levy or cause to be levied for their benefit a property tax on real and tangible personal property leaving the same taxable situs as the intangible personal property from which the revenue is derived..."

O.C.G.A. § 48-6-30 imposed various penalties upon the taxpayer:

> In addition to all other penalties and interest provided by law, every taxpayer failing to return for taxation all intangible personal property which it is his duty to return as required by this article shall pay a penalty, as part of the tax imposed by this article, in an amount equal to 25 percent of the original tax on property not returned.

O.C.G.A. § 48-6-32 provided a bar penalty:

> "Willful failure to return any property to the commissioner for taxation as required by this article shall be a bar to any action upon the

> property in any court and may be pleaded as a complete defense to the action, but the holder of the property may at any time pay all taxes, accrued interest, and penalties. Payment in full shall relieve the holder from the penalty provided in this Code section."

O.C.G.A. § 48-6-44 provided for criminal penalties:

> "(a) It shall be unlawful for any person willfully to violate any provision of this article or willfully to fail to do any act required of him by this article.
>
> (b) Any person who violates subsection (a of this Code section shall be guilty of a misdemeanor."

As a tax, any unpaid tax would result in the issuance of a tax execution, which could be recorded on the General Execution Dockets of any of the counties in the State of Georgia, and which tax execution was enforceable for a period of seven years through levy and/or garnishment and which tax execution could be renewed, by re-recording, ad infinitum.

O.C.G.A. § 48-3-21 provided:

> "All state, county, municipal, or other tax executions, before or after legal transfer and record, shall be enforced within seven years from:
>
> (1) The date of issue; or

> (2) The time of the last entry upon the tax execution by the officer authorized to execute and return the execution if the execution and entry are properly entered or reentered upon the execution docket or books in which executions issued on judgments and entries on executions issued on judgments required to be entered or reentered."

Lombard plead in its Complaint that it was the owner of 2,000 shares of CMS Energy Corporation, a foreign corporation, that it had made a due and proper return of its ownership as provided in O.C.G.A. § 48-6-27, that State Revenue Commissioner had assessed Lombard for intangible tax for the tax year 1994, that DeKalb Tax Commissioner had issued a notice of intent to issue a tax execution, that Lombard had posted a cash bond of $112.58 with the Clerk of the Superior Court of DeKalb County, which was double the amount of the tax ($56.29), pursuant to O.C.G.A. § 40-6-38, that the tax on intangible personal property imposed by O.C.G.A. § 48-6-20 is illegal and unconstitutional for the reason that the Act (O.C.G.A. § 48-6-22) exempts stocks of corporations organized under the laws of the State of Georgia,

stocks of foreign corporations domesticated under the laws of the State of Georgia and subsidiaries not incorporated in the State of Georgia, but at least ninety percent owned by Georgia corporations with their principal place of business in this State, that the exemptions violate the Commerce Clause of the United States Constitution, the Equal Protection Clause of the Fifth and Fourteenth Amendments to the United States Constitution, the Equal Protection Clause of the Bill of Rights of the Georgia Constitution, and further that the exemptions are an integral and necessary part of the entire tax scheme contemplated by O.C.G.A. § 48-6-20, et seq.

Lombard also paid to the Clerk of the Superior Court the sum of $115.00 as court costs.

At this time there was pending the case of Fulton Corporation v. Faulkner, Case No. 94-1239 (now 116 S.Ct. 848 (1996)), wherein the United States Supreme Court had granted certiorari to determine the constitutionality of a similar intangibles tax statute of the State of North Carolina. The State of North Carolina had, when the Supreme Court of the United

States granted certiorari, repealed its intangibles tax statutes in order to seek to declare the issue moot.

On February 21, 1996, this Court, disregarding the mootness strategy of the State of North Carolina, rendered a decision declaring the North Carolina intangibles tax to be unconstitutional and suggesting that the State of North Carolina could remedy the unconstitutionality of its intangibles tax statutes by either not collecting the discriminatory tax or by assessing and collecting the intangibles tax from those holders of securities, which had, prior to the declaration of the statutes of unconstitutionality, been held exempt. Fulton Corporation v. Faulkner, 116 S.Ct. 848 (1996). Not to be outdone by the North Carolina Legislature, the Georgia Legislature repealed the Georgia Property Intangibles Act effective for the year 1996, all in an effort to make the issue of the unconstitutionality moot.

In addition, in spite of the decision of this Court, the State Revenue Commissioner continued to press objectionable,

improper, harassing, frivolous and vexatious discovery procedures against Lombard and its officers.

Shortly thereafter, Lombard's counsel, Mr. Proctor, contacted Lombard and requested that the State of Georgia be dismissed as a party defendant. Mr. Proctor had apparently been in contact with State Revenue Commissioner and DeKalb Tax Commissioner in connection with dismissing State Revenue Commissioner as a party defendant. Lombard requested that Mr. Proctor inform it of the reason that State Revenue Commissioner had been named as a party, if, in fact, State Revenue Commissioner was not a necessary party. Receiving no satisfactory answer, Lombard refused to dismiss State Revenue Commissioner as a party in this action.

On April 4, 1996, Mr. Proctor called Lombard and told Lombard that a motion to dismiss for mootness was being filed because some **person unknown to Lombard had paid the outstanding intangibles tax** claimed to be due to DeKalb Tax Commissioner.

On April 8, 1996, State Revenue Commissioner and DeKalb Tax Commissioner filed a Motion To Dismiss alleging substantially that on March 21, 1996, the Georgia intangibles tax had been repealed for the tax years beginning on or after January 1, 1996, and that "**on Friday, April 5, 1996, Lombard's 1994 intangible tax liability was paid; . . .**" Nowhere in the Motion was it stated that Lombard had not itself paid the intangible tax, but, rather than one John L. Coalson, Jr. of the law firm of Alston & Bird had paid the tax, without the consent of or permission from Lombard. Neither did the motion state that Mr. Coalson had confirmed with counsel for both State Revenue Commissioner and DeKalb Tax Commissioner and also with Lombard's counsel Proctor prior to paying this tax.

Upon determining who the unknown interloper was, Lombard contacted this person, a member of a huge law firm, in an attempt to determine the reason that this "person" had intervened the Lombard case. On April 8, 1996, Lombard sent

a fax to this "person" detailing the conversation of April 4, 1996. (Appendix B).

> As I advised you by telephone on April 4, 1996, The Lombard Corporation brought an action seeking to declare the intangibles tax unconstitutional. The Lombard Corporation was not suffering from lack of funds to pay the intangibles tax, and, in fact posted a bond and paid the court costs for bringing this action.
>
> On Thursday afternoon, April 4, 1996, I was advised by Robert J. Proctor, that you had made a payment to Tom Scott, Tax Commissioner, for the ad valorem taxes for the Year 1994, and that based upon that purported payment, the defendants in the above-styled case have filed a Motion To Dismiss for mootness.
>
> I did not understand, nor do I understand, after the telephone conversation with you, the reason for your interference in this case nor the fact that, coincidentally, the defendants in the case filed a Motion To Dismiss on the basis of mootness, almost simultaneously with your unwarranted and improper action.
>
> You attempted to assure me that the payment by you was out of the goodness of your heart and out of your pocket, and not in behalf of any clients. I am impressed with your philanthropy. I wonder why you were not that concerned about this case when it was first filed, or, before that, when this unconstitutional tax remained imposed upon the citizens of the State of Georgia.

I understand that the State of Georgia is taking the position that it may impose the ad valorem tax on these huge corporations whose stock has heretofore been exempted from ad valorem taxation. Shall I assume that you and your law firm do not represent any clients who would be subject to a huge imposition of tax if the exemption were removed retroactively?

If the tax is unconstitutional, as it is, then there was no need for you to pay this tax. If the tax was not unconstitutional, and, if the tax was an obligation of The Lombard Corporation, then the payment by you of the tax constitutes income to The Lombard Corporation.

I herewith demand that you request that the Tax Commissioner of DeKalb County return to you whatever payment you made purportedly in behalf of The Lombard Corporation. Since you were unauthorized to act in any matter on behalf of The Lombard Corporation, I advise you that ~~if~~ this payment results in a dismissal of this suit against the Revenue Department of the State of Georgia and DeKalb County, that The Lombard Corporation will take appropriate action.

If you and your clients are desirous of seeing that this pending action is resolved, you may arrange to meet with me.

If you are in need of making a charitable contribution, may I suggest that you do so for your local church, The United Way or The Salvation Army.

–

In response thereto, Lombard received a telefax from this unknown "person", a member of the firm of Alston & Bird. (Appendix C). Both of these documents were placed in evidence in the mootness hearing in the trial court.

> Your fax of yesterday afternoon arrived after I had already left the office. I received it today, and also received a copy of your fax to Barbara Nelan in the Attorney General's Office.
>
> I have a difficult time responding to your letters. Sarcasm is a form of communication I have never learned to appreciate; and threats -- both veiled -- and not so veiled -- are likewise a form of communication I do not appreciate.
>
> When we spoke by telephone on Thursday, I did not tell you that I paid the assessment issued by DeKalb County against The Lombard Corporation "out of the goodness of my heart" or as a matter of philanthropy. I did tell you that I made the payment out of my own pocket, and not on behalf of my firm or of clients. I had monitored the *Lombard v. Collins* litigation for some time-- state and local taxes is the specific focus of my practice, and any litigation mounting a constitutional challenge to a Georgia tax is of interest to me. I did not become concerned about the potential implications of that litigation to myself and others, however, until the U.S. Supreme Court handed down its decision in *Fulton Corporation v. Faulkner*, and the Attorney General's Office subsequently announced its position that only the <u>exemptions</u> in the former Georgia Intangibles Tax statute for stock of

domestic and domesticated foreign corporations are unconstitutional, and that those exemptions might be stricken and the tax enforced without those exemptions. As you know, the Attorney General's Office took that position in the *Lombard* litigation in response to The Lombard Corporation's Motion for Judgment on the Pleadings. At that point, the *Lombard* litigation took on new implications for many individuals, including myself. Although your letters refer to Georgia taking the position that it may impose the ad valorem tax on "huge corporations whose stock has heretofore been exempted", the fact is that it is not the "huge corporations" who would potentially face such liability, but rather the shareholders who own stock of corporations incorporated in Georgia or headquartered here. While some corporations certainly would be affected, so, too, would many thousands of individual shareholders, potentially including myself.

Issues such as the retroactive applicability of the Supreme Court's decision in *Fulton Corporation v. Faulkner*, the severability of the allegedly unconstitutional Georgia exemptions from the tax, the potential retroactive enforcement of the tax without the exemptions for domestic and domesticated foreign corporations, etc., are complex constitutional issues on which different taxpayers may have very different positions, depending on their individual holdings of intangible assets. They are issues whose outcome could be affected -- either directly or implicitly -- by rulings Judge Flake might make, but that I think would be better addressed in a context other than an attempt to collect a small assessment for 1994 of a now-repealed tax.

The repeal of the tax effectively gave The Lombard Corporation the major relief it was seeking in its action -- protection against future assessments of tax on the shares of stock it owns in foreign corporations. The only additional relief to which it was entitled in its own behalf (as opposed to as representative of other taxpayers) was protection against having to pay the assessment of tax for 1994, for which it denied liability based on the alleged unconstitutionality of the tax. I looked and could find nothing that would prevent payment of a disputed tax assessment by a third party who does not, in making the payment, assert any right of recovery for the payment from the party disputing liability or any lien or other claim to the assets of such party. As far as The Lombard Corporation is concerned, it disputed any obligation to pay the assessed tax, and now it has no further potential obligation.[1]

As I told you in our telephone conversation, I certainly do not wish to take any action that damages the bona fide interests of The Lombard Corporation or that is in any other way improper. In your letter, you mentioned that The Lombard Corporation had posted a bond and paid court costs for bringing its action -- if you would like for me to reimburse those costs to the company, I will do so. Additionally, if you can direct me to authority for the proposition that my payment of The Lombard

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[1] With respect to your concern that my payment of the assessment may result in taxable income to The Lombard Corporation, I believe it is fairly clear that discharge of an obligation that is the subject of a bona fide dispute does not result in discharge-of-indebtedness income. If you doubt that proposition, I will be happy to provide you with authority.

Corporation's disputed assessment is wrongful, I will take whatever actions I can to set things right. However, the fact is, The Lombard Corporation has suffered no harm and has no grounds for complaint. The reason you told me you want the litigation to go forward is that you have other corporations who are in the same position and you want a ruling on the unconstitutionality of the tax to benefit those corporations and "all other taxpayers." But The Lombard Corporation is not a proper representative for all taxpayers other than itself and has no right to maintain its appeal for the benefit of any other taxpayer -- you sought to have the appeal certified as a class action, and Judge Flake properly denied that request. The only relief to which The Lombard Corporation is entitled is to not have to pay the assessment of tax for 1994 which it believes to be unconstitutional, and to be assured that it will not face such an assessment again in the future. It has received that relief and has suffered no harm, and there is no further controversy to be resolved.

Again, Mr. Nodvin, it is not my intent or desire to cross swords with you or to cause any harm to your client, The Lombard Corporation. But it is my belief that further proceedings in Lombard's tax appeal would raise issues that are better avoided or, if they must be faced, better resolved in another context. If you feel that my payment of the tax was improper, and can explain to me why, I will do all I can to make things right. However, I believe your proper remedy, if you believe my payment of the tax to be wrongful, is simply to raise the issue with Judge Flake in the context of the Motion to Dismiss on the basis of mootness, and ask her to order the payment refunded to me if it was improper. That would certainly be the most expeditious manner to

> get a ruling on the issue, and would mitigate any damages you might otherwise allege The Lombard Corporation might suffer.

On April 9, 1996, Mr. Proctor, in furtherance of his complicity in the conspiracy to declare moot the issue as to the constitutionality of the intangibles tax filed, contrary to Lombard's instructions, a Response to the Motion to Dismiss (Appendix D), which contained this language:

> Plaintiff's counsel has been instructed by the Plaintiff to oppose the Defendants' motion and Plaintiff's counsel so informs the court that Plaintiff opposes the motion. Plaintiff's counsel, however, after diligent study and investigation, has been unable to find any authority to support an argument in opposition to the Defendants motion although there may be such authority. Furthermore, Plaintiff's counsel has reviewed all of the authorities cited by the Defendants and finds that such authorities do stand for the position for which they were cited.

The case came on for a hearing before the Honorable Gail C. Flake, a former DeKalb County Assistant County Attorney, who entered an Order dismissing Lombard's case for mootness. (Appendix E).

Within the time provided by law, Lombard filed its Notice of Appeal, and paid all costs required for the Record for this Court.

The case was docketed in the Supreme Court of Georgia on July 9, 1996 as Case Number S96A1632. On September 5, 1996, the Supreme Court of Georgia transferred the appeal to the Court of Appeals of the State of Georgia on the basis that the trial court had expressly declined to rule on any constitutional issues thereby setting up a precedent that the right party in the right court can defeat a ruling on a constitutional question by the action of the trial court declining to rule on constitutional issues. (Appendix F).

The Court of Appeals, in analyzing the issues before it, decided that it needed guidance from the Supreme Court of Georgia and certified to this Court five (5) questions. (Appendix G).

The certified questions were designated in the Supreme Court of Georgia as Case Number S97Q0649. On June 30,

1996, the Supreme Court of Georgia refused to answer the five (5) questions certified to it. (Appendix H).

On November 19, 1997, the Court of Appeals reversed the trial court and in its decision rightfully named the person who interceded in Lombard's case in the Superior Court of DeKalb County, without Lombard's consent, for the purpose of obstructing justice and for the purpose of denying to Lombard its right to the courts a "**third-party interloper**." (Appendix I).

After State Revenue Commissioner and DeKalb Tax Commissioner filed their Motions for Reconsideration in the Court of Appeals, and after State Revenue Commissioner and DeKalb Tax Commissioner filed their Petitions for Certiorari to the Supreme Court of Georgia, the Supreme Court of Georgia granted the Petitions for Certiorari.

On November 9, 1998, the Supreme Court of Georgia reversed the Court of Appeals and declared the case of Lombard Corporation v. Collins, et al. moot. (Appendix J).

Within the time provided by law, Lombard filed its appropriate notices with the Supreme Court of Georgia, and now files this its Petition for Certiorari.

ANALYSIS

> "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state." Constitution of the State of Georgia, Article 1, Section 1, Paragraph 12.

A person's right to prosecute or defend may not be abrogated prior to the institution of an action or at any time thereafter. The denial of this right is, if nothing else, obstruction of justice.

It is simple to understand the motivation of the obstructing parties from the telefax of Mr. Coalson (Appendix C).

> ... "I did not become concerned about the potential implications of that litigation to myself and others, however, until the U.S. Supreme Court handed down its decision in *Fulton Corporation v. Faulkner*, and the Attorney General's Office subsequently announced its position that only the exemptions in the former Georgia Intangibles Tax statute for stock of domestic and domesticated foreign corporations are unconstitutional, and that

> those exemptions might be stricken and the tax enforced without those exemptions."

Mr. Coalson did not set out the names of the clientele who, as residents of Georgia, might own vast amounts of stock in Coca-Cola, United Parcel Service, The Home Depot, and a multitude of other sizable entities.

Mr. Coalson also did not make mention of the fact that by declaring the Georgia Intangibles Tax unconstitutional, citizens of the State of Georgia could seek a refund of these illegal and improper taxes.

If and when this Court grants Lombard's Petition for Certiorari, it will have before it the entire record which includes the position of the taxing authorities that taxes are to be collected no matter from whom, and, apparently, without regard to the unconstitutional taking.

There is another purpose for the delay in decision. It is now the year 1999. This matter has been in the courts of Georgia for over three and one-half (3-1/2) years and litigated on appeal for nearly three (3) years after the decision

of this Court (Faulkner v. Fulton Corporation, supra), determining that the similar intangible tax of North Carolina was unconstitutional. The time to seek refund of the taxes under Georgia law is quickly coming to an end.

This Court may well wish to comment on the effect that the acts of the obstructing parties have as to any statute of limitation which would limit the right of citizens of the State of Georgia to seek refunds of the illegally collected taxes and to cancel all outstanding tax executions derived from non-payment of any of such taxes.

CONCLUSION

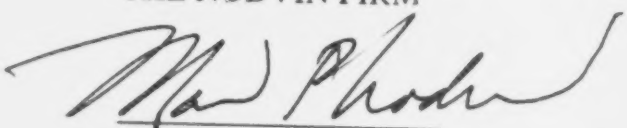
The decision in the case of Faulkner v. Fulton Corporation, supra, is clear and needs no explanation and elucidation.

The tenor of our Constitution is expressed in simple words in the Preamble. It is and was the purpose of the Constitution to "establish justice." Thus follows its mandate that we, all of us, see that justice prevails.

If the facts set out in the Statement of the Case are not sufficient to satisfy this Court that the Writ of Certiorari should be granted, then so be it. The actions of the obstructing parties offends fairness and justice.

Respectfully submitted,

THE NODVIN FIRM



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APPENDIX

APPENDIX A
A-1

LOMBARD CORPORATION,	)
	)
Plaintiff,	)
	)
v.	)CIVIL
	)ACTION FILE
	)NO. _____
MARCUS COLLINS, in his official Capacity as Commissioner of the Department of Revenue of the State of Georgia and TOM SCOTT, in his official Capacity as Tax Commissioner of DeKalb County, Georgia,	)
	)
Defendants.	)

PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW, LOMBARD CORPORATION, a Georgia corporation, Plaintiff, and shows for its complaint as follows:

1.

Lombard Corporation ("Plaintiff") is a Georgia corporation.

2.

Defendant Marcus Collins is joined herein in his official capacity as Commissioner of the Department of Revenue of the State of Georgia and may be served by personal service upon him at 270 Washington Street, Atlanta, Georgia.

3.

Defendant Tom Scott is joined herein in his official capacity as Tax Commissioner of DeKalb County and may be served by personal service in his office at 120 West Trinity Place, Decatur, Georgia 30030.

4.

Jurisdiction and venue are proper in this Court.

5.

Plaintiff is the owner of 2,000 shares of stock in CMS Energy Corporation.

6.

Plaintiff made a due and proper return of its ownership of said stock pursuant to O.C.G.A. § 48-6-27.

7.

Defendant Collins has assessed Plaintiff for intangible tax on Plaintiff's ownership of such stock for tax year 1994.

8.

Defendant Scott has issued a notice of intent to issue a tax execution dated June 28, 1995, in the amount of $56.29, a true and correct copy of which is attached hereto as Exhibit "A".

9.

Contemporaneously with the filing of this Complaint, Plaintiff has posted a cash bond with the Clerk of the Superior Court of DeKalb County, Georgia in double the amount of the tax sought or $112.58, pursuant to the requirements of O.C.G.A. § 48-6-38.

10.

The tax on intangible personal property imposed by O.C.G.A. § 48-6-20 is illegal and unconstitutional for the reason that it exempts stocks of corporations organized under the laws of the State of Georgia, stocks of foreign corporations domesticated under the laws of the State of Georgia, and subsidiaries not incorporated in the State of Georgia but at least 90% owned by Georgia corporations with their principal place of business in this state, all pursuant to O.C.G.A. § 48-6-22.

11.

Such exemption violates the Commerce Clause of the United States Constitution, the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the Equal Protection Clause in the Bill of Rights of the Georgia Constitution. The aforesaid exemptions are an integral and necessary part of the entire tax scheme contemplated by O.C.G.A. § 48-6-20, et seq.,

and, therefore, the entirety of such taxation statute is invalid for such reasons.

WHEREFORE, Plaintiff respectfully request that this Court:

1. Enter a declaratory judgment that the Georgia intangible tax as set forth in O.C.G.A. § 48-6-20, et seq., is invalid and unconstitutional; and

2. Enter a permanent injunction against Defendant Marcus Collins from making any further assessments of any property in the State of Georgia under said statutes; and

3. Enter a permanent injunction against Defendant Tom Scott from attempting to collect any intangible taxes against Plaintiff in and for DeKalb County, Georgia; and

4. Assess costs of this action against Defendants.

Respectfully submitted this ____ day of July, 1995.

/s/_____
Robert J. Proctor
Georgia State Bar # 588438

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3520 Piedmont Road, Suite 350
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404/816-4070

Of Counsel:

Southeastern Legal Foundation, Inc.
3340 Peachtree Road NE
Suite 2515
Atlanta, Georgia 30326

LOMBARD CORPORATION,	)
	)
Plaintiff,	)
	)
v.	)CIVIL
	)ACTION FILE
	)NO. _____
MARCUS COLLINS, in his official Capacity as Commissioner of the Department of Revenue of the State of Georgia and TOM SCOTT, in his official Capacity as Tax Commissioner of DeKalb County, Georgia,	)
	)
Defendants.	)

VERIFICATION

I, Betty L. Shaw, being first duly sworn and under oath do say and depose that I am the Vice-President of Lombard Corporation, a Georgia corporation, the Plaintiff in the within and foregoing Complaint for Declaratory and Injunctive Relief, that I have read the allegations of said Complaint and that the facts alleged therein are true and correct.

Sworn to and subscribed
before me this 19th
day of July, 1995.

/s/_____

/s/_____
Notary Public
My commission expires: Notary Public, Cobb County, Georgia
[NOTARY SEAL] My Commission Expires July 7, 1996

APPENDIX B

B-1

THE LOMBARD CORPORATION

1040 CROWN POINTE PARKWAY NE
SUITE 290
ATLANTA, GEORGIA 30338-4777
Telephone (770) 390-9030
Facsimile (770) 390-9225

TO: John L. Coalson, Jr., Esquire

FAX NO: (404) 881-7777

FROM: Marvin P. Nodvin, President of The Lombard Corporation

FAX NO: (770) 390-9225

DATE: April 8, 1996

NO. OF PAGES: Two (2)

SUBJECT: The Lombard Corporation v.MarcusCollins,et al., Superior Court of DeKalb County, Civil Action File No. 95-10114-4
Property I.D.: 00310566 (Intangibles Tax)
Tax Year: 1994

Dear Mr. Coalson:

As I advised you by telephone on April 4, 1996, The Lombard Corporation brought an action seeking to declare the intangibles tax unconstitutional. The Lombard Corporation was not suffering from lack of funds to pay the intangibles tax, and, in fact posted a bond and paid the court costs for bringing this action.

On Thursday afternoon, April 4, 1996, I was advised by Robert J. Proctor, that you had made a payment to Tom Scott,

Tax Commissioner, for the ad valorem taxes for the Year 1994, and that based upon that purported payment, the defendants in the above-styled case have filed a Motion To Dismiss for mootness.

I did not understand, nor do I understand, after the telephone conversation with you, the reason for your interference in this case nor the fact that, coincidentally, the defendants in the case filed a Motion To Dismiss on the basis of mootness, almost simultaneously with your unwarranted and improper action.

You attempted to assure me that the payment by you was out of the goodness of your heart and out of your pocket, and not in behalf of any clients. I am impressed with your philanthropy. I wonder why you were not that concerned about this case when it was first filed, or, before that, when this unconstitutional tax remained imposed upon the citizens of the State of Georgia.

I understand that the State of Georgia is taking the position that it may impose the ad valorem tax on these huge corporations whose stock has heretofore been exempted from ad valorem taxation. Shall I assume that you and your law firm do not represent any clients who would be subject to a huge imposition of tax if the exemption were removed retroactively?

If the tax is unconstitutional, as it is, then there was no need for you to pay this tax. If the tax was not unconstitutional, and, if the tax was an obligation of The Lombard Corporation, then the payment by you of the tax constitutes income to The Lombard Corporation.

I herewith demand that you request that the Tax Commissioner of DeKalb County return to you whatever payment you made purportedly in behalf of The Lombard Corporation. Since you were unauthorized to act in any matter on behalf of The Lombard Corporation, I advise you that if this payment results in a dismissal of this suit against the Revenue Department of the State of Georgia and DeKalb County, that The Lombard Corporation will take appropriate action.

If you and your clients are desirous of seeing that this pending action is resolved, you may arrange to meet with me.

If you are in need of making a charitable contribution, may I suggest that you do so for your local church, The United Way or The Salvation Army.

Yours truly,

THE LOMBARD CORPORATION

Marvin P. Nodvin, President

MPN:cf
cc: Robert J. Proctor, Esquire

The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this message is strictly prohibited. If you have received this message in error, please immediately notify the sender by telephone and return the original message to us at the address above via the United States Postal Service. Thank you.

APPENDIX C

C-1

ALSTON & BIRD

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424

404-881-7000
Fax: 404-881-7777

John L. Coalson, Jr. **Direct Dial: 404-881-7482**

April 9, 1996

VIA TELECOPY AND U.S. MAIL

Marvin P. Nodvin, Esq.
President, The Lombard Corporation
1040 Crown Pointe Parkway, N.E.
Suite 290
Atlanta, Georgia 30338-4777

Re: *Lombard Corporation v. Marcus Collins, et al.*

Dear Mr. Nodvin:

Your fax of yesterday afternoon arrived after I had already left the office. I received it today, and also received a copy of your fax to Barbara Nelan in the Attorney General's Office.

I have a difficult time responding to your letters. Sarcasm is a form of communication I have never learned to appreciate; and threats -- both veiled and not-so-veiled – are likewise a form of communication I do not appreciate.

When we spoke by telephone on Thursday, I did not tell you that I paid the assessment issued by DeKalb County against The Lombard Corporation "out of the goodness of my heart" or as a matter of philanthropy. I did tell you that I made the payment out my own pocket, and not on behalf of my firm or of clients. I had monitored the *Lombard v. Collins* litigation for some time – state and local taxes is the specific focus of my practice, and any litigation mounting a constitutional challenge to a Georgia tax is of interest to me. I did not become concerned about the potential implications of that litigation to myself and others, however, until the U.S. Supreme Court handed down its decision in *Fulton Corporation v. Faulkner*, and the Attorneys General's Office subsequently announced its position that only the exemptions in the former Georgia Intangibles Tax statute for stock of domestic and domesticated foreign corporations are unconstitutional, and that those exemptions might be stricken and the tax enforced without those exemptions. As you know, the Attorney General's Office took that position in the *Lombard* litigation in response to The Lombard Corporation's Motion for Judgment on the Pleadings.

At that point, the Lombard litigation took on new implications for many individuals, including myself. Although your letters refer to Georgia taking the position that it may impose the ad valorem tax on "huge corporations whose stock has heretofore been exempted," the fact is that it is not the "huge corporations" who would potentially face such liability, but rather the shareholders who own stock of corporations incorporated in Georgia or headquartered here. While some corporations certainly would be affected, so, too, would thousands of individual shareholders, potentially including myself.

Issues such as the retroactive applicability of the Supreme Court's decision in *Fulton Corporation v. Faulkner*, the severability of the allegedly unconstitutional Georgia exemptions from the tax, the potential retroactive enforcement of the tax without the exemptions for domestic foreign corporations, etc., are complex constitutional issues on which different taxpayers may have very different positions, depending on their individual holdings of intangible assets. They are issues whose outcome could be affected – either directly or indirectly – by rulings Judge Flake might make, but I think would be better addressed in a context other than an attempt to collect a small assessment for 1994 of a now-repealed tax.

The repeal of the tax effectively gave The Lombard Corporation the major relief it was seeking in its action – protection against future assessments of tax on the shares of stock it owns in foreign corporations. The only additional relief to which it was entitled in its own behalf (as opposed to as representative of <u>other</u> taxpayers) was protection against having to pay the assessment of tax for 1994, for which it denied liability based on the alleged unconstitutionality of the tax. I looked and could find nothing that would prevent payment of a disputed tax assessment by a third party who does not, in making the payment, assert any right of recovery for the payment from the party disputing liability or any lien or other claim to the assets of such party. As far as The Lombard Corporation is concerned, it disputed any obligation to pay the assessed tax, and now it has no further potential obligation.[1]

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[1] With respect to your concern that my payment of the assessment may result in taxable income to The Lombard Corporation, I believe it is fairly clear that discharge of an obligation that is the subject of a bona fide

As I told you in our telephone conversation, I certainly do not wish to take any action that damages the bona fide interests of The Lombard Corporation or that is in any other way improper. In your letter, you mentioned that The Lombard Corporation had posted a bond and paid court costs for bringing its action – if you would like for me to reimburse those costs to the company, I will do so. Additionally, if you can direct me to authority for the proposition that my payment of The Lombard Corporation's disputed assessment is wrongful, I will take whatever actions I can to set things right.

However, the fact is, The Lombard Corporation has suffered no harm and has no grounds for complaint. The reason you told me you want the litigation to go forward is that you have other corporations who are in the same position and you want a ruling on the unconstitutionality of the tax to benefit those corporations and "all other taxpayers." But The Lombard Corporation is not a proper representative for any taxpayers other than itself and has no right to maintain its appeal for the benefit of any other taxpayer – you sought to have the appeal certified as a class action, and Judge Flake properly denied that request. The only relief to which The Lombard Corporation is entitled is to not have to pay the assessment of tax for 1994 which it believes to be unconstitutional, and to be assured that it will not face such an assessment again in the future. It has received that relief and has suffered no harm, and there is no further controversy to be resolved.

Again, Mr. Nodvin, it is not my intent or desire to cross swords with you or to cause any harm to your client, The

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dispute does not result in discharge-of-indebtedness income. If you doubt that proposition, I will be happy to provide you with authority.

Lombard Corporation. But it is my belief that further proceedings in Lombard's tax appeal would raise issues that are better avoided or, if they must be faced, better resolved in another context. If you feel that my payment of the tax was improper, and can explain to me why, I will do all I can to make things right. However, I believe your proper remedy, if you believe my payment of the tax to be wrongful, is simply to raise the issue with Judge Flake in the context of the Motion to Dismiss based on the basis of mootness, and ask her to order the payment refunded to me if it was improper. That would certainly be the most expeditious manner to get a ruling on that issue, and would mitigate any damages you might otherwise allege The Lombard Corporation might suffer.

Very truly yours,
/s/
John L. Coalson, Jr.

JLC:vks
cc: Robert J. Proctor, Esq. (via fax)
Barbara E. Nelan, Esq. (via fax)
[AD961000.195]

APPENDIX D
D-1

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

LOMBARD CORPORATION, Plaintiff, v. MARCUS COLLINS, in his official capacity as Commissioner of the Department of Revenue in the State of Georgia, and TOM SCOTT in his official capacity as Tax Commissioner of DeKalb County, Georgia, Defendants.	* * * * *CIVIL ACTION FILE *NO. 95-10114-4 * * * ***FINAL** ***ORDER** * (CASE DISPOSITION) *INIT. /s/ DATE 5/16/96

ORDER

On April 18, 1996, the above-styled action came before this Court for a hearing on the Defendants' Motion to Dismiss (filed April 8, 1996); Plaintiff's Motion for Judgment on the Pleadings (filed February 23, 1996); and Commissioner's Motion to Compel Discovery (filed March

22, 1996).[1]

Upon review of the pleadings and other matters of record, the Court finds as follows:

FINDINGS OF FACT

The following facts are uncontested by the parties.

1. The original complaint in this Declaratory Judgment action was filed on or about August 2, 1995. This complaint sought a declaration that the Georgia intangible tax statute, as set forth in O.C.G.A. § 48-6-20, et seq., was invalid and unconstitutional; a permanent injunction against Defendant Marcus E. Collins, Sr. from issuing any further assessments under this statute; and a permanent injunction against Defendant Tom Scott from taking any collection action for taxes imposed under this statute.

2. The only issue raised in this action concerning intangible tax for a tax year prior to 1996 pertained to Lombard's 1994 intangible tax due DeKalb County in the amount of $56.29.[2]

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[1] The Court also heard Robert J. Proctor's Motion for Withdrawal as Counsel and the Commissioner's Motion to Disqualify Marvin P. Nodvin. This Court entered an Order granting Mr. Proctor's motion and excusing him from further representation of the Plaintiff. In an oral order, this Court denied the Commissioner's Motion to Disqualify Marvin P. Nodvin, without prejudice to the Commissioner's ability to raise this issue again if this action were to be tried. Lombard was represented at the hearing by Marvin P. Nodvin.

[2] The bond posted pursuant to O.C.G.A. § 48-6-38 was for $112.58. The Plaintiff's motion for class certification was denied by this Court's order

3. On March 21, 1996, Governor Miller signed House Bill No. 6 and House Bill No. 1101. Both bills repeal the Georgia intangible tax on personal property, effective beginning in tax year 1996. House Bill No. 6 became law upon the Governor's signature. House Bill No. 1101 becomes effective on January 1, 1997 if House Resolution 734 is passed in the November 1996 general statewide election.[3]

4. On or about April 10, 1996, the Plaintiff filed an "Amendment." This Amendment purported to add a second count to the original complaint related to intangible tax paid by the Plaintiff for the 1993 tax year. At the April 18, 1996 hearing, Plaintiff's counsel withdrew this Amendment.

5. All of the Plaintiff's intangible tax (plus accrued interest) for the 1994 tax year was paid to DeKalb County by a person who is not a party to this action. It is uncontested that this payment completely satisfied all of the Plaintiff's outstanding intangible tax liability for any year prior to 1996.

CONCLUSIONS OF LAW

The repeal of Georgia's intangible tax statute relieved

Lombard from any risk of an intangible tax assessment for

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dated December 27, 1996.

[3] House Resolution 734 authorizes the General Assembly by general law to repeal any intangible personal property tax without approval by

the present or any future year. In addition, the payment of the 1994 tax also relieved Lombard from any risk of future collection of intangible tax already assessed. Accordingly, the combined effect of the repeal and payment is that the Plaintiff has realized all of the injunctive relief sought in this action. This action is therefore moot. See Davis v. Cason, 185 Ga. 334, 194 S.E. 874 (1938); Abernathy v. Dorsey, 189 Ga. 72, 5 S.E.2d 39 (1939); Gober v. Colonial Pipeline Company, 228 Ga. 668, 187 S.E.2d 275 (1972) (The fact that a party might derive some future benefit from a favorable adjudication on an abstract question, or that a decision would settle the question of costs, does not establish jurisdiction for review.).

The recent Georgia Court of Appeals' decision in Kelly v. City of Atlanta, 217 Ga. App. 365, 457 S.E.2d 675 (1995) presents analogous facts to those in the present action.

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referendum.

In Kelly, a taxpayer's petition for declaratory judgment seeking to enjoin the City of Atlanta from imposing an allegedly illegal property tax was dismissed based upon the trial court's finding that substantially all of the taxes at issue had been levied, collected and disbursed. Based upon this fact, the trial court held that there was no present, concrete controversy subject to disposition by declaratory action. The Georgia Court of Appeals upheld the dismissal finding that "Georgia statutes make declaratory judgment relief available ***prior to payment*** of disputed taxes 'to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.'" Id. At 367, (emphasis provided by the Court, quoting James B. Beam Distilling Co. v. State of Ga., 263 Ga. 609, 437 S.E.2d 782 (1993)). The Court of Appeals further concluded that "as a general rule, a suit for injunctive relief regarding the collection of alleged illegal taxes should not be entertained by the courts if the taxes at

issue have been substantially collected and disbursed." Id.

The jurisdiction of this Court to issue a declaratory judgment is limited by the requirement that there be an actual justiciable controversy in that Lombard must "show facts or circumstances whereby it is in a position of uncertainty or insecurity because of a dispute and of having to take some future action which is properly incident to its alleged right, and which future action without direction from the Court might reasonably jeopardize its interest." Oxford Finance Companies, Inc. v. Dennis, 185 Ga. App. 177, 363 S.E.2d 614 (1987) (quoting Phoenix Assurance Co. v. Glens Falls Ins. Co., 101 Ga. App. 530, 532-33, 114 S.E.2d 389 (160)); O.C.G.A. § 9-4-2(a); Loyd v. City of Irwinton, 142 Ga. App. 626, 236 S.E.2d 889 (1977). Further, jeopardy to Lombard's general economic interest is insufficient to meet the jurisdictional actual controversy requirement. Brown v. Lawrence, 204 Ga. 788, 792, 51 S.E. 2d 651 (1949); West v.

Judicial Council of Georgia, 184 Ga. App. 894, 363 S.E.2d 176 (1987).

While a declaratory judgment is available notwithstanding the availability of any other adequate legal or equitable provision, " where there exists a remedy, either in law or in equity, a petition for declaratory judgment will lie only when there be some fact or circumstances which necessitate a determination of disputes, not merely for the purpose of enforcing accrued rights, but in order to guide and protect the petitioner from uncertainty and insecurity with respect to the propriety of some future act or conduct which is properly incident to his alleged rights, and which future action without such direction might reasonably jeopardize his interest." McCullum v. Quarles, 214 Ga. 192, 104 S.E.2d 105 (1958). Accord, e.g., Oxford Finance Companies, Inc. v. Dennis, 185 Ga. App. 177, 363 S.E.2d 614 (1987); Baron v. State Farm Mutual Automobile Ins.

Co., 157 Ga. App. 16, 276 S.E.2d 78 (1981); Holcomb v. Bivens, 103 Ga. App. 86, 118 S.E.2d 840 (1961); Reliance Insurance Co. v. Brooks Lumber Company, Inc., 101 Ga. App. 620, 115 S.E.2d 271 (1960).

In the present action, the repeal of the intangible tax and the payment of the Plaintiff's 1994 tax have resulted in an absence of any uncertainty or insecurity affecting Lombard. In addition to the Plaintiff having realized all of the injunctive relief requested, any declaratory judgment issued in the present action would be an impermissible advisory opinion holding merely, "in effect, that should the accrued rights and obligations at issue results in future litigation, then [the party obtaining a declaration in its favor] would prevail on the merits." Oxford Finance Companies, Inc. v. Dennis, 185 Ga. App. 177, 177, 363 S.E.2d 614 (1987); Chattahoochee Bancorp, Inc. v. Roberts, 203 Ga. App. 405, 416 S.E.2d 875 (1992). See also O.C.G.A. § 15-1-

12 ("Parties may not give jurisdiction to a Court by consent. ...").

The Plaintiff contends that the payment of its 1994 tax was done for the improper purpose of interfering with this Court's jurisdiction. Based upon this contention the Plaintiff argues that this Court can retain jurisdiction and issue a declaratory judgment regarding the constitutionality of the now repealed intangible tax. This Court does not agree. The Plaintiff does not cite, nor is this Court aware of, any authority which would support a finding that the unsolicited tax payment was improper or that this Court would have the authority to exercise jurisdiction when the Plaintiff has clearly realized the relief requested and is not in a position of uncertainty or insecurity requiring declaratory relief. Because this Court lacks subject matter jurisdiction over this moot action, no opinion is expressed regarding the merits of the asserted constitutional claims.

CONCLUSION

Accordingly, for the reasons stated above, the Defendants' Motion to Dismiss is granted. Because this action has been dismissed, this Court will not address any other pending motion.

SUMMARY

(1) The Defendants' Motion to Dismiss (filed April 8, 1996) shall be, **and hereby is, GRANTED.**

(2) The Plaintiff's Motion for Judgment on the Pleadings (filed February 23, 1996) and the Commissioner's Motion to Compel Discovery (filed March 22, 1996) shall be, **and hereby are, DISMISSED AS MOOT.**

SO ORDERED this the 16 day of May, 1996.

/s/_____
JUDGE GAIL C. FLAKE
DEKALB SUPERIOR COURT

PREPARED BY:
cc: BARBARA E. NELAN
Georgia Bar No. 537537
Assistant Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-3330
Facsimile: (404) 657-9932

cc: Marvin Nodvin
Kathleen Wasch

APPENDIX E
E-1

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

LOMBARD CORPORATION,	)
	)
Plaintiff,	)
	)
v.	)CIVIL ACTION FILE
	)NO. 95-10114-4
MARCUS COLLINS, in his official capacity as Commissioner of the Department of Revenue in the State of Georgia, and TOM SCOTT in his official capacity as Tax Commissioner of DeKalb County, Georgia,	)
	)
Defendants.	)

PLAINTIFF'S RESPONSE TO DEFENDANTS MOTION TO DISMISS

NOW COMES Plaintiff Lombard Corporation and filed this its response to Defendants' Motion to Dismiss and to the accompanying request to expedite consideration of such motion.

Plaintiff concurs that the Court's consideration of this motion should be expedited. The resolution of this matter may

preclude the necessity for the trial which has presently been set for April 18, 1996, as well as Plaintiff having to respond to Motion to Compel that has been filed by Defendant Collins, which response is due at noon on April 15, 1996. Plaintiff further shows that Plaintiff's counsel has been instructed by Plaintiff to request the expeditious resolution of this matter.

Plaintiff's counsel has been instructed by the Plaintiff to oppose the Defendants' motion, and Plaintiff's counsel so informs the Court that Plaintiff opposed the motion. Plaintiff's counsel, however, after diligent study and investigation, has been unable to find any authority to support an argument in opposition to the Defendants' motion, although there may be such authority. Furthermore, Plaintiff's counsel has reviewed all of the authorities cited by the Defendants and finds that such authorities do stand for the propositions for which they are cited.

Respectfully submitted this 9th day of April, 1996.

/s/
Robert J. Proctor
Georgia Bar No. 588438

Proctor, Felton & Atkinson
3520 Piedmont Road
Suite 350
Atlanta, Georgia 30305
(404) 816-4070

Southeastern Legal Foundation
3340 Peachtree Road, N.E.
Suite 2515
Atlanta, Georgia 30326
(404) 365-8500

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing parties in the foregoing matter with a copy of PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage thereon to:

Warren R. Calvert
Senior Assistant Attorney General
Barbara E. Nelan
Assistant Attorney General
40 Capitol Square, Suite 119
Atlanta, Georgia 30334-1300
30020

Kathleen A. Wasch
Asst. County Attorney
DeKalb Cty. Law Dept.
1300 Commerce Drive
5th Floor
Decatur, Georgia

Marvin P. Nodvin
1040 Crown Point Parkway, N.E.
Suite 290
Atlanta, Georgia 30338-4777

Lombard Corporation
c/o Marvin Nodvin
1040 Crown Point
Parkway, NE
Suite 290
Atlanta,GA 30338-4777

This 9th day of April, 1996.

/s/
Robert J. Proctor
Georgia Bar No. 588438

Proctor, Felton & Atkinson
3520 Piedmont Road
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Atlanta, Georgia 30305
(404) 816-4070

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(404) 365-8500

APPENDIX F
F-1

(Seal) **SUPREME COURT OF GEORGIA**
Case No. S96A1632

Atlanta September 5, 1996

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

LOMBARD CORPORATION v. MARCUS E. COLLINS, SR., Comr., et al.

From the Superior Court of DeKalb County.

Notwithstanding the statement in the notice of appeal that jurisdiction is in this Court because it "involves the constitutionality of O.C.G.A. § 48-6-20 et seq," it appears that the trial court expressly declined to rule on any constitutional issues. Accordingly, this case is not within the exclusive jurisdiction of this Court and it is ordered that the same hereby be transferred to the Court of Appeals of Georgia.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta
(Seal)
I hereby certify that the above is a true extract from
The minutes of the Supreme Court of Georgia
Witness my signature and the seal of said court hereto
Affixed the day and year last above written.

/s/, Chief Deputy Clerk

APPENDIX G
G-1
SECOND DIVISION
BIRDSONG, P.J.,
RUFFIN and ELDRIDGE, JJ.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

January 16, 1997

In the Court of Appeals of Georgia

A97A0150. LOMBARD CORPORATION v. COLLINS et al. 93-10

The Court of Appeals desires instruction from the Supreme Court upon the following questions, a determination of which is necessary for a decision in this case. Ga. Const. Of 1983, Art. VI., Sec. V, Par. IV; Art. VI, Sec. VI, Par. III (7).

The relevant facts of this case are as follows: Appellant/plaintiff Lombard Corporation appeals from the order of the superior court granting appellees/defendants'

motion to dismiss and dismissing appellant's motion for judgment on the pleadings. Suit for declaratory judgment and injunctive relief was brought against appellees Marcus E. Collins, Sr. in his official capacity as Commissioner of the Georgia Department of Revenue and Tom Scott in his official capacity as Tax Commissioner of DeKalb County, Georgia, asserting the unconstitutionality of the Georgia intangible tax (O.C.G.A. § 48-6-20 et seq.)

The intangible tax assessment at issue pertained to appellant's 1994 intangible tax bill in the amount of $56.29. The trial court in entering its order noted that "on March 21, 1996, [the Governor] signed House Bill No. 6 and House Bill No. 1101. Both bills repeal the Georgia intangible tax on personal property, effective beginning in tax year 1996. House Bill No. 6 became law upon the Governor's signature. House Bill No. 1101 becomes effective on January 1, 1997 if House Resolution 734 is passed in the November 1996 general statewide election. The passage of these bills

effectively repeals the intangible tax for the present (1996) and future tax years. The parties do not challenge the effectiveness of this repeal." The trial court further found that "all of the plaintiff's intangible tax (plus accrued interest) for the 1994 tax year was paid to DeKalb County by a person who is not a party to this action. It is uncontested that this payment completely satisfied all of the plaintiff's outstanding intangible tax liability for any year prior to 1996." The trial court then held: "The repeal of Georgia's intangible tax statute relieved [appellant] from any risk of an intangible tax assessment for the present or any future year. In addition, the payment of the 1994 tax also relieved [appellant] from any risk of future collection of intangible tax already assessed. Accordingly, the combined effect of the repeal and payment is that the [appellant] has realized all of the injunctive relief sought in this action. This action is therefore moot." The trial court next addressed appellant's contentions that jurisdiction to dispose of the suit on its

merits was retained because the payment of the 1994 intangible tax had been done for the improper purpose of interfering with the trial court's jurisdiction, and concluded: "Based upon this contention the [appellant] argues that this court can retain jurisdiction and issue a declaratory judgment regarding the constitutionality of the now repealed intangible tax. This court does not agree. The [appellant] does not cite, nor is this court aware of, any authority which would support a finding that the unsolicited tax payment was improper or that this court would have the authority to exercise jurisdiction when the [appellant] has clearly realized the relief requested and is not in a position of uncertainty or insecurity requiring declaratory relief."

This appeal was transferred to this court by order of the Supreme Court of Georgia, as it was not deemed a case within their exclusive jurisdiction because "the trial court expressly declined to rule on any constitutional issues." The sole appellate enumeration is that the trial court erred in

entering an order dismissing said suit "upon the ground that the payment by an unknown third person of the unconstitutional intangible tax rendered appellant's cause of action moot."

It is settled that "[o]nce deprivation of property has occurred through payment of a substantial amount of the disputed taxes, declaratory judgment no longer is available, as at that point the rights of the parties have already accrued. A petition for declaratory judgment will not lie '"where all rights of the parties have already accrued and where no facts or circumstances are alleged showing a necessity for adjudication in order to relived the plaintiff from the risk of taking future undirected action, which, without such action, would jeopardize the plaintiff's interests."'" Kelly v. City of Atlanta, 217 Ga. App. 365, 367 (2) (457 S.E.2d 675); see Sentry Ins. V. Majeed, 194 Ga. App. 276 (390 S.E.2d 269).

Appellant contends, inter alia, that the question of court costs remains to be adjudicated thereby precluding the

dismissal of this suit. In Gober v. Colonial Pipeline Co., 228 Ga. 668, 670 (187 S.E.2d 275) it was held: "1. This court will upon its own motion dismiss an appeal where it affirmatively appears that the questions presented have become moot or that a decision would be of no benefit to the complaining party. ... 2. The fact that the appellants might possibly derive some future benefit from a favorable adjudication on an abstract question, or that a decision would settle the question of costs, will not require this court to retain and decide the case." (Emphasis supplied). Therefore, merely because the third-party interloper did not also pay court costs would not standing alone preclude the dismissal of the suit for mootness.

We further note that the purpose for the statutory provisions pertaining to declaratory judgments is "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations." O.C.G.A. § 9-4-1. Thus, it has long been recognized that "[s]uch proceeding

must not be merely one in which the court is called upon to decide an abstract or theoretical question of law, or to give an advisory opinion. Questions which are merely incidental to and determinative of no controversy between the parties are not the proper subject-matter of a declaratory-judgment proceeding." Darnell v. Tate, 206 Ga. 576, 580 (1) (58 S.E.2d 160).

Further, "as a general rule, a suit for injunctive relief regarding the collection of allegedly illegal taxes should not be entertained by the courts if the taxes at issue have been substantially collected and disbursed." Kelly, supra at 367(2). Appellant's taxes, which are the only taxes here at issue, have been collected; payment has been made, albeit by some third-party interloper, of all intangible taxes now due and owing by appellant.

Thus, under existing precedent, this action would appear to become moot, unless there exists some exception to the rule which would preclude a third-party interloper

from depriving a corporate entity of this state of a judicial adjudication of its cause of action in our courts by said third party indirectly injecting himself into the outcome of the litigation (without the apparent prior consent of the court or the party plaintiff) by paying the tax in controversy. Our examination of the law of this state discloses no controlling prior precedent. Appellees, citing Gunby v. Yates, 214 Ga. 17, 19 (102 S.E.2d 548), contend that a tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purpose, and therefore "the State's interest is in payment of taxes due; the source of the payment is irrelevant." We recognize the State's legitimate interest in having a taxpayer pay the taxes he lawfully owes; we acknowledge that, as a practical matter, the State probably does not care who pays a taxpayer's tax bill as long as the taxes are paid. However, this does not resolve the issue before us. There remains the question whether this

appellant, a legal corporate entity of this state, has a general right to access to our courts to obtain legal redress and whether, if such a right exists, it can be eradicated by the conduct of a third-party interloper – regardless of the motive prompting the interference of such third party. As the existing precedent provides this court with no definitive answer to these serious issues, the following questions are hereby certified to the Supreme Court of this state:

a. Do the provisions of Ga. Const. Of 1983, Art. I, Sec. I, Par. XII, apply to a corporate entity such as appellant? If so, was appellant's constitutional right violated by the mooting of this case by reason of the payment of the taxes in question by a third party?

b. As a matter of public policy is a third party, who is not a party to a lawsuit, authorized to pay the taxes of the party plaintiff without either the trial court's or the plaintiff's consent, thereby causing the plaintiff's case to become moot?

c. Assuming arguendo the State has a legitimate interest in having a tax assessment against a specific entity paid by some intervening third party, does that interest prevail when balanced against the interest of the taxpayer to seek a judicial adjudication in the courts of this state as to the legality of the tax which has been assessed against him?

d. Additionally, does a corporate entity have a legal right to refuse a gratuitous payment of its assessed taxes by a third party who is not a party to existing litigation or who does not possess any direct interest in either the appellant corporation or the state revenue system? If so, under the facts of this case, would that interest outweigh a legitimate interest of the State, if any, to have the said tax assessment paid by a third party?

e. Is the holding of the lower court legally correct that the existing law of this state renders both the declaratory and injunctive relief actions in this case moot? If so, does the gratuitous , unsolicited payment of appellant's

tax by a third-party interloper, without either the consent of appellant or the trial court, for any basis in law or equity warrant the creation of an exception to the rules rendering both the declaratory judgment and injunctive relief actions moot?

The Clerk of this court is directed to prepare a certified copy of the foregoing questions and transmit the same, together with the record in this case, to the Supreme Court.

APPENDIX H
H-1

In the Supreme Court of Georgia

Decided: **June 30, 1997**

S97Q0649. Lombard Corporation v. Collins, et al.

PER CURIAM.

The Court of Appeals has certified five questions to this Court under the authority of Ga. Court. 1983, Art. VI, Sec. V, Par. IV, Par. III (7). Lombard Corp. v. Collins, 224 Ga. App. 282 (480 SE2d 47) (1997). The sole issue enumerated as error on appeal in the Court of Appeals is that the trial court erred in entering an order of dismissal on the ground that payment of an intangible tax by a third person, not a party to the litigation, rendered the cause of action moot. Since the certified questions do not conform to the requirement that an answer be necessary to the determination of the case, and because the trial court expressly declined to rule on any constitutional question, the

questions were improperly certified to this Court by the Court of Appeals. See Pitts v. General Motors Acceptance Corp., 231 Ga. 54 (199 SE2d 9 (1973). The case is hereby returned to the Court of Appeals.

For the foregoing reasons, the certified questions are not answered. All Justices concur.

APPENDIX I
I-1
SECOND DIVISION
BIRDSONG, P.J.,
RUFFIN and ELDRIDGE, JJ.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

November 19, 1997

In the Court of Appeals of Georgia

A97A0150. Lombard Corporation v. Collins et al. Bio-010

BIRDSONG, Presiding Judge.

This is an appeal from the superior court's order granting appellees/defendants motion to dismiss and dismissing appellant/plaintiff's motion for summary judgment on the pleadings. We first reviewed this case in Lombard Corp. v. Collins, 224 Ga. App. 282 (480 S.E.2d 47) where the relevant facts pertinent to this appeal are reported. Appellant brought suit for declaratory judgment and injunctive relief asserting the unconstitutionality of the

Georgia intangible tax (O.C.G.A. § 48-6-20 et seq.); appellant corporation had been assessed an intangible tax in the amount of $56.29. The record reflects that while suit was pending, the intangible tax assessment at issue was paid (without the prior consent of the appellant or of the trial court) by a person who was not a party to the litigation. (The tax was paid by a partner of an established law firm who apparently perceived that both himself and certain shareholders of corporations incorporated or headquartered in Georgia conceivably could be adversely affected by a ruling in the Lombard case, and that the issues there raised would be better avoided or resolved in another factual context.) Thus, the payment of the taxes was made, as we held in Lombard, supra, by a third party interloper. After payment of the taxes by the interloper, the trial court held that the appellant's suit was moot and the motion to dismiss was granted. We found that, under current Georgia law the action "would appear to become moot, unless there exists

some exception to the rule which would preclude a third-party interloper from depriving a corporate entity of this state of a judicial adjudication of its cause of action in our courts by said third party indirectly injecting himself into the outcome of the litigation ... by paying the tax in controversy." Id. At 284. Because this posed a question of first impression and more importantly, because of the serious public and legal policy questions which could arise if persons not parties to litigation are able to interfere at will and. in effect, buy out a pending law suit, we certified certain questions to the Supreme Court of this State, pursuant to Art. VI, Sec. V, Par. IV, and Art. VI, Sec. VI, Par. III (7), Ga. Const. Of 1983, seeking their guidance as to this sensitive legal issue. (We elected to seek guidance because we were concerned that if public policy allowed this type of conduct, powerful persons or legal entities could buy-out law suits at will to which they were not party litigants but which they had a substantial interest as to judicial outcome; and that

such a policy conceivably could result in the birth of the undesirable practice of targeting suits of major social and legal import for mooting by buy-out, thereby preventing legal opinions from being entered which could be detrimental to the special interests of such third-party interlopers.) The Supreme Court, however, transmitted the case back to this court with the certified question unanswered. We must now address this issue of first impression being ever mindful of the legal significance of our holding. Held:

1. We first sought guidance as to the application of the provisions of Art. I, Sec. I, Par. XII, Ga. Const. Of 1983. The Supreme Court , citing Pitts v. General Motors & C. Corp., 231 Ga. 54 (199 S.E.2d 902), declined to rule on the certified constitutional question because the trial court expressly declined to rule thereon. We did not certify this issue because we believed appellant had adequately preserved a constitutional issue on appeal; rather, we

certified this issue because we perceived that the answer would shed judicial light on whether the mooting of appellant's suit, due to the actions of a third-party interloper, would violate the public policy of this state. As this court is without authority to interpret a state constitutional provision, particularly to the issues of first impression (but can only apply established constitutional law principles to existing case facts), Kolker v. State, 193 Ga. App. 306 (1) (387 S.E.2d 597), aff'd. 260 Ga. 240 (391 S.E.2d 391); accord Phillips v. MacDougald, 219 Ga. App. 152, 155 (2)(e) (464 S.E.2d 390), we now must consider the public policy issue without benefit of a ruling as to what effect, if any, the constitutional right to the courts has regarding this matter.

2. We now consider as a matter of first impression whether it violates the public policy of this state for a third party, who is not a party to a lawsuit, to pay the taxes of a party plaintiff without the prior consent of

either the trial court of the party plaintiff, thereby causing the plaintiff's case to become moot? Considering the legitimate danger posed to the ordinary citizen's ability to obtain meaningful access to the courts of this state should such a practice and its potential variations be condoned, the balancing of the interests of the judiciary in the preservation of the integrity of the Georgia judicial system in the eyes of the citizens of this state, and the fact that appellant has been denied his day in court (as to the adjudication of an issue which we cannot say is frivolous) by the uninvited actions of a third-party interloper, we conclude that it violates public policy of this state to allow a case to be mooted by the intervention of a third-party who is not a party to the litigation, under the circumstances attendant in this particular case. Accordingly, we hold that a legitimate exception exists to the usual rules of mootness under these existing circumstances, and that the suit was not rendered moot by

the payment of the tax assessment by the third-party.

Judgment reversed. Ruffin and Eldridge, JJ., concur specially.

A97A0150. Lombard Corporation v. Collins et al.

RUFFIN, Judge, concurring specially.

I fully agree with all that is said in the majority opinion because I, too, believe that as a matter of public policy an interloper should not have the ability to deprive a party of the adjudication of his or her legitimate claims. However, payment of the intangible tax was not the trial court's sole basis for finding appellant's claim for declaratory relief moot. In 1996 our Legislature repealed the intangible tax which is being challenged on constitutional grounds in this case. See Ga.L. 1996, p. 117, § 6, effective March 21, 1996. The trial court held that appellant's claim for declaratory relief was moot not only due to payment of the tax, but also because "'[t]he repeal of Georgia's

intangible tax statute relieved [appellant] from any risk of any intangible tax assessment for the present or any future year. In addition, the payment of the 1994 tax also relieved [appellant] from any risk of future collection of intangible tax already assessed.'" Lombard Corp. v. Collins, 224 Ga. App. 282, 282-283 (480 S.E.2d 47) (1997). I write separately to address this part of the trial court's holding.

Although I agree with the trial court that rescission of the tax relieved appellant of numerous risks associated with the present and future enforcement of the tax, the mere repeal of the tax statutes did not render all related interests moot.[1] In a long line of cases, the United States Supreme Court has held that due process requires a clear and certain remedy for taxes collected in violation of the Constitution. See Reich v. Collins, 513 U.S. (115 S.Ct. 547, 130 L.Ed.2d 454) (1994). In fact, the Court in Reich found that "'a denial

[1] For a general discussion concerning the mootness effects of statutory change, see Moore's Federal Practice, Par. 101.98 (3ed. 1997).

by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself a contravention of the Fourteenth Amendment[.]' [Cit.]" Id. At 130 L.Ed.2d 454, 458. Although due process does not necessarily require a state to provide a refund of such unconstitutional taxes, it does require a state to provide taxpayers with either a predeprivation remedy in which to challenge the imposition of the tax, a postdeprivation regime such as a refund procedure, or a hybrid regime which might incorporate both. See Id. At 130 L.Ed.2d 454, 459. Accordingly, though it is true that the State may no longer enforce the tax against appellant, it is also true that due process requires that the State provide appellant, and other similarly situated taxpayers, with a scheme to remedy an unconstitutionally exacted tax. Therein lies the issue which breaths life into the appellant's constitutional challenge here.

As the Court found in Reich, Georgia law indeed provides for a postdeprivation remedy in the form of a

refund statute. Id. This statute, codified at O.C.G.A. § 48-2-35, provides that subject to a limitation period "[a] taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously collected from him under the laws of this state. ..." O.C.G.A. § 48-2-35(a). Although the Georgia Supreme Court has held that this refund statute "does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid[,]" the decision in which that holding was presented has been vacated by the United States Supreme Court. Reich v. Collins, 262 Ga. 625, 627-628(2) (422 S.E.2d 846) (1992) vacated Reich v. Collins, U.S. (113 S.Ct. 3028, 125 L.Ed.2d 717) (1993). Accordingly, a viable issue exists concerning whether taxpayers have a right to a refund of intangible taxes paid if the tax is subsequently declared unconstitutional.

I am authorized to state that Judge Eldridge joins in this special concurrence.

In the Supreme Court of Georgia

Decided: **NOV 9 1998**

S98GO548. COLLINS v. LOMBARD CORPORATION
S98GO553. SCOTT v. LOMBARD CORPORATION

BENHAM, Chief Justice.

This case began in the trial court as a constitutional challenge to O.C.G.A. § 48-6-20 et seq., Georgia's intangible personal property tax statute, but has become an appeal concerning the doctrine of mootness in Georgia law. Lombard Corporation (hereinafter "Lombard"), which had been assessed a tax of $56.29, began the action by filing suit against Collins, in his official capacity as Commissioner of the Georgia Department of Revenue, and Scott, in his official capacity as Tax Commissioner of DeKalb County. Lombard sought a declaration that the intangible personal property tax statute was

unconstitutional, and a permanent injunction forbidding Collins to make any further assessments and forbidding Scott to attempt to collect the tax from Lombard. While the suit was pending, the General Assembly repealed the intangible personal property tax statute and a third party associated neither with Lombard nor with either defendant paid the taxes assessed against Lombard. The trial court, without ruling on the constitutional issue, granted the defendants' motion for dismissal of the suit as moot. An appeal by Lombard to this Court was transferred to the Court of Appeals because the constitutional issue had not been decided in the trial court. The Court of Appeals first posed a series of certified questions1 which this Court, by an unpublished order, declined to answer because the answers to those questions were not necessary to resolution of the appeal. The Court of Appeals then reversed the trial court's dismissal of the suit as moot, creating a "public

policy exception" to the mootness doctrine, holding "that it violates public policy of this state to allow a case to be mooted by the intervention of a third-party who is not a party to the litigation, ... that a legitimate exception exists to the usual rules of mootness under these existing circumstances, and that the suit was not rendered moot by the payment of the tax assessments by the third-party." Lombard Corp. v. Scott,[1] 229 Ga. App. 654 (2) (494 S.E.2d 538) (1997). This court granted the writ of certiorari to review that ruling, posing to the parties this question: "Whether the Court of Appeals erred in creating a 'public policy' exception to the mootness doctrine under the facts of this case."

1. At the outset, we deem it appropriate to clarify the doctrine of mootness. In Chastain v. Baker, 255 Ga. 432, 433 (339 S.E.2d 241) (1986), this Court explained the doctrine, holding that a case is moot when its resolution would amount

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1 Lombard Corp. v. Collins, 224 Ga. App. 282 (480 S.E.2d 47) (1997).

to the determination of an abstract question not arising upon existing facts or rights, and that mootness is a mandatory ground for dismissal. However, Chastain also held that "a case may be moot, but, because the error is capable of repetition and yet evades review, the appeal will be considered." Id. at 433. That latter holding has been referred to in case law as an "exception" to the doctrine of mootness (see, e.g., Citizens for Ethical Government v. Gwinnett Place Assoc., L.P., 260 Ga. 245 (1) (392 S.E.2d 8) (1990); Bowers v. Board of Regents &c. of Georgia, 259 Ga. 221, fn. 1 (378 S.E.2d 460) (1989); Atlanta Gas Light Co. v. Georgia Public Svc. Comm., 212 Ga. App. 575 (1) (442 S.E.2d 860) (1994)), and this Court has spoken of "discretionary jurisdiction" to consider cases where the issue is likely to recur, yet evade review. See Atlanta Gas Light Co. v. Georgia Textile Mfrs. Ass'n, 266 Ga. 738 (470 S.E.2d 230) (1996).

The problem with denominarting cases which present

an issue capable of repetition yet evading review as moot, but subject to an exception to the mootness doctrine, is that the exception is inconsistent with the holding in Chastain that dismissal of moot cases is mandatory. A sound analytical approach to the doctrine of mootness, one which avoids the contradiction and which we now hold to be correct, was enunciated in In the Interest of I.B., 219 Ga. App. 268 (464 SE2d 865) (1995). There, after a careful analysis of the doctrine of mootness as an element of jurisdiction, Judge Beasley (then Chief Judge Beasley) explained that the term "moot" must be narrowly construed to exclude from mootness those matters in which there is " [i]ntrinsically insufficient time to obtain judicial relief for a claim common to an existing class of sufferers. Id. at 263. Since there would always be, in such cases, a live controversy, albeit no longer between the named parties, jurisdiction would not be foreclosed by the prohibition against advisory opinions. Thus, Chastain's holding that a case

is moot when its resolution would amount to the determination of an abstract question not arising upon existing facts or rights remains a correct statement of the doctrine of mootness so long as it is understood that a case which contains an issue that is capable of repetition yet evades review is not moot because a decision in such a case would be based on existing facts or rights which affect, if not the immediate parties, "an existing class of sufferers." In the Interest of I.B., supra.

2. Applying the doctrine of mootness as explained above to this case yields a result of mootness. While the issue between the parties, Lombard's liability for a specific tax assessment, ceased to be a live controversy when the tax was paid, the underlying issue raised by the suit was the constitutionality of the statute. If that underlying issue were-to recur, it would not necessarily evade review: the expectation that someone would pay the taxes in another suit is too speculative to rescue the constitutional issue from mootness

(see In the Interest of I.B., supra); and the underlying issue in this case could be raised in a suit for a refund, an action not susceptible of the third-party involvement in this case.2 Thus, under this State's existing law, there is nothing about this case that prevents it from being moot.

3. The remaining question is whether the "public policy exception" to the mootness doctrine created in this case by the Court of Appeals is valid. We conclude that it is not, for two reasons. First, the concern expressed by the Court of Appeals, that citizens of this State might be denied their access to the courts by the action of wealthy individuals who will "buy-out" lawsuits to prevent the consideration of certain issues, does not stand up to analysis under the doctrine of mootness as explained in the first division of this opinion: the issue of the constitutionality of the tax statute is one which does not evade review because it is can be brought up by

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2 Lombard expressly abandoned its claim for refund in the trial court.

anyone who claims a right to a refund; indeed, that claim could have been kept in this case so as to force a decision on constitutionality. Second, the notion of an exception to the mootness doctrine which would permit a court to consider a case notwithstanding that the case is moot is inconsistent with the concept of mootness as a jurisdictional matter. If the case were moot. public policy alone would not be sufficient to bestow jurisdiction over it. Because the creation of *ad hoc* exceptions for individual cases is unnecessary and undesirable in that they foster uncertainty in the law and inappropriately serve to expand the jurisdiction of the court applying such exceptions, we cannot approve of them. We hold, therefore, that the Court of Appeals erred in creating the "public policy exception" to the mootness doctrine on which it based its decision in this case.

Judgment reversed. All the Justices concur.